

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 27, 2007 Session

BYRD & ASSOCIATES, PLC v. JENNIFER and ALAN SILISKI

**An Appeal from the Chancery Court for Williamson County
No. 31546 Russ Heldman, Chancellor**

No. M2006-01479-COA-R3-CV - Filed October 26, 2007

This is a breach of contract and legal malpractice case. The defendant client is the mother of four minor children. In January 2004, the client's children were removed from her home after authorities found, among other things, 216 dogs and 14 cats living at the residence. The defendant client hired the plaintiff law firm to represent her in the ensuing criminal and juvenile court proceedings. When the client allegedly failed to pay her legal fees, the law firm filed this lawsuit to collect the fees and to set aside an allegedly fraudulent conveyance of realty from the client to her ex-husband. In response, the client filed counterclaims alleging legal malpractice, negligence, breach of contract, fraudulent misrepresentation, and promissory fraud. The law firm filed a motion for summary judgment supported by several expert affidavits. The client filed a response arguing against the summary judgment motion, and filed expert affidavits in support of her position. The trial court apparently excluded the expert testimony proffered by the client and granted the law firm's motion for summary judgment. The client now appeals the grant of summary judgment. We affirm in part and reverse in part, affirming the trial court's exclusion of the client's proffered expert testimony, but reversing the grant of summary judgment on certain claims that would not require the client to produce expert testimony.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed in
Part and Reversed in Part**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J. and WALTER C. KURTZ, J. joined.

Jennifer Siliski, Franklin, Tennessee, Appellant, Pro Se

Kenneth J. Sanney, Franklin, Tennessee, for Appellees Byrd & Associates, PLC, Kenneth J. Sanney, and Rebecca Byrd

OPINION

In January 2004, Judge Lonnie Hoover of the Juvenile Court of Williamson County entered an order finding the children of Third-Party Plaintiff/Appellant Jennifer Siliski ("Siliski") to be

dependant and neglected and authorizing the Tennessee Department of Children's Services ("DCS") to take the children into protective custody. The order stated:

[T]he children, while living in the home of their mother, are living in such environmental conditions as to endanger their health and welfare. Trash was found throughout the house, dog feces and urine was on the floor, medical syringes and drugs were found throughout the home in reach of the children, a variety of animal medications including questionable controlled substances, clothing was strewn and piled throughout the house and an extreme malodor of feces and urine was throughout the home. Further, approximately 216 dogs and 14 cats were removed from the residence

There is no less drastic alternative to removal of the children from the home and custody of the parent.

Once the animals were removed and Siliski's home was deemed "environmentally safe," the Department was authorized to return one of Siliski's children to Siliski's custody "due to [the child's] severe disability. . . ." As to the other children, Siliski was granted visitation and ordered to pay child support.¹

DCS's decision to take Siliski's children into protective custody spawned a myriad of legal challenges for Siliski, including multiple Juvenile Court dependency and neglect proceedings, several misdemeanor charges and one felony drug charge, a petition for a writ of habeas corpus and a civil action to register a foreign judgment against Siliski. To represent her in these matters, Siliski entered into a contract with a law firm, Counter Defendant/Appellee Byrd & Associates, PLC ("the law firm"). Two attorneys with the law firm, Third-Party Defendants/Appellees, Rebecca Byrd ("Byrd") and Kenneth Sanney ("Sanney"), represented Siliski in several of these matters, including the Juvenile Court dependency and neglect proceedings and several of the criminal proceedings.

In February 2004, the law firm recorded a copy of its retainer agreement with Siliski in the chain of title for Siliski's home in Franklin, Tennessee. In March 2004, Siliski conveyed the home to her ex-husband, Defendant Alan Siliski ("Mr. Siliski"). In July 2004, the law firm apparently terminated its relationship with Siliski because Siliski was no longer paying her legal fees.

When the legal fees remained unpaid, the law firm filed a lawsuit against Siliski and her ex-husband. The complaint alleged that Siliski had breached the retainer agreement with the law firm by failing to pay her fees. It also alleged that Siliski had fraudulently conveyed her interest in her home to her ex-husband, Mr. Siliski, in order to avoid collection of legal fees. Siliski filed an answer denying the law firm's allegations. She also filed a counter-complaint against the law firm and a

¹The record includes checks written by Siliski under the heading "Hollybelle Maltese, Inc." After seizure of the animals, Siliski sought to modify her child support obligation, contending that "her income has been negatively impaired due to the loss of her business." Thereafter, Siliski was convicted on criminal charges stemming from her care of the hundreds of dogs and cats removed from her home. She was prohibited from buying, selling or breeding animals, and permitted only to have one pet dog per child.

third-party complaint against Byrd and Sanney, asserting theories of negligence, legal malpractice, breach of contract, fraudulent misrepresentation, and promissory fraud.²

Siliski's counter-complaint and third-party complaint did not specify which alleged facts gave rise to which specific legal theories for recovery. Rather, Siliski set forth several transactions or occurrences giving rise to her claims and, in a separate section of the complaint, asserted several legal grounds for recovery. The transactions or occurrences giving rise to Siliski's complaint included allegations that (1) Byrd and Sanney held in trust for Siliski a sum of money that Siliski had been ordered to pay as child support, but failed to forward those payments to DCS; (2) Byrd and Sanney billed Siliski for a March 18, 2004 meeting that did not occur; (3) Byrd and Sanney convinced Siliski to have her home professionally cleaned in order to improve her chances of success in the dependency and neglect proceedings but misled her about who would pay for the cleaning; (4) Byrd and Sanney filed a motion to alter or amend an order of child support without Siliski's consent; (5) the law firm entered into a contract with Siliski to file a complaint in federal court, but never actually filed the lawsuit; (6) Byrd and Sanney took unauthorized legal actions on behalf of Siliski; (7) Byrd and Sanney, on behalf of the law firm, obtained a lien on Siliski's real property to secure payment of fees that were not yet due; (8) Byrd and Sanney improperly terminated their representation of Siliski at a critical juncture in her legal proceedings; and (9) Byrd and Sanney filed untimely motions. Based on these factual allegations, Siliski alleged that she was entitled to recover for negligence, legal malpractice, breach of contract, fraudulent misrepresentation, and promissory fraud.

In response to Siliski's counter-complaint and third-party complaint, Byrd, Sanney, and the law firm (collectively, "Defendants"), filed a motion for summary judgment, seeking dismissal of Siliski's claims. The Defendants filed a memorandum in support of the motion, as well as a concise statement of material facts and supporting affidavits. In their motion and the supporting documents, the Defendants focused almost exclusively on Siliski's allegations of legal malpractice. The concise statement of material facts addressed only the manner in which Byrd and Sanney handled criminal proceedings against Siliski and the dependency and neglect proceedings, both stemming from the removal of the hundreds of animals from her home.

Byrd and Sanney each filed an affidavit in support of the summary judgment motion. Both affidavits focused on the adequacy of their representation of Siliski, maintaining that, in their professional opinions, they were not in breach of their contract with Siliski and they did not commit negligence, legal malpractice, or fraudulent misrepresentation. The Defendants submitted a third affidavit, given by Derek Smith ("Smith"), Assistant District Attorney General for the Twenty-First Judicial District. In his affidavit, Smith asserted that, in his professional opinion, Byrd and Sanney committed no negligence in their representation of Siliski.

In the motion for summary judgment, Byrd and Sanney specifically rebutted Siliski's allegations that they failed to forward to DCS the child support payments that Siliski had been ordered to pay, from monies held in trust by the law firm. They asserted that any delay in

² At this point, Siliski was represented by attorney Dan R. Alexander.

forwarding the payments to DCS was a result of their filing a motion on Siliski's behalf to alter or amend the child support order and confusion regarding the party to whom the money should be sent. As exhibits to the Defendants' statement of undisputed facts, they attached copies of the checks received by DCS. The motion did not otherwise address the version of events set forth in Siliski's counter-complaint and third-party complaint.

In response to the Defendants' motion for summary judgment, Siliski noted material facts that she had alleged in her counter-complaint and her third-party complaint that were not addressed by Byrd and Sanney. These included Siliski's allegations that (1) the law firm failed to file a federal lawsuit that it had agreed to file; (2) Byrd and Sanney failed to forward child support payments to DCS that Siliski had deposited in trust with the law firm; (3) Byrd and Sanney told Siliski that she needed to hire a cleaning service to regain custody in her children's dependency and neglect proceedings and that she would not have to pay for such service; (4) Byrd and Sanney filed a motion to alter or amend Siliski's child support order without Siliski's authorization; (5) Byrd and Sanney billed Siliski for a meeting that never occurred; and (6) Byrd and Sanney ended their representation of Siliski without court approval. Siliski did not address the assertion by Byrd and Sanney that the support payments were in fact made and that they did not cause any delay in forwarding the child support payments.

In support of her response to the Defendants' motion for summary judgment, Siliski filed three affidavits. Siliski's own affidavit reaffirmed her version of the facts alleged in her counter-complaint and her third-party complaint, and addressed some of the allegations in the law firm's complaint against her. Specifically, Siliski asserted that she did not attend a meeting with Sanney on March 18, 2004, although she was billed for it, and she attached to her affidavit a receipt for the \$150 filing fee for the federal lawsuit allegedly not filed. In addition, Siliski filed the affidavit of Jimmy Duncan ("Duncan"), an attorney licensed to practice law in Tennessee, to rebut the expert opinion affidavits of Byrd, Sanney, and Smith. In his affidavit, Duncan expressed the opinion that the legal services provided to Siliski by Byrd and Sanney were not in compliance with the standard of care required of attorneys practicing law in Williamson County. In further rebuttal to the Defendants' expert affidavits, Siliski submitted the affidavit of her ex-husband, Mr. Siliski, who asserted that he was licensed to practice law in Tennessee. Mr. Siliski also expressed the opinion that the conduct of Byrd and Sanney fell below the required standard of care.

Subsequently, the Defendants took the deposition of one of Siliski's experts, attorney Jimmy Duncan, in which they probed the basis for Duncan's affidavit. During the deposition, the following exchange took place:

Q (by Byrd): Do you know anything about the issues involved in [Siliski's] federal claim?

A (by Duncan): None whatsoever.

Q: Do you know anything about the issues involved in the juvenile proceeding?

A: No.

Q: Do you know anything about the issues involved in a suit with Maureen McSweeney?

A: No.

Q: Do you even know how many different cases on which Byrd and Associates represented Ms. Siliski?

A: Again, I reviewed the file and based my affidavit on information in the file concentrating on the counter complaint.

Q: So is that answer no, you don't know how many lawsuits in which Byrd and Associates represented Ms. Siliski?

A: No, I don't.

Q: You don't even know whether we represented her in juvenile court or not?

A: No, I don't.

Q: Do you know whether we represented her in criminal court?

A: I remember seeing you on TV.

Apparently, Duncan refused to read or sign the transcript of the deposition, despite a court order to do so.

Thereafter, the Defendants filed a reply to Siliski's response to their motion for summary judgment. In it, the Defendants argued that neither Duncan's nor Mr. Siliski's affidavit should be deemed admissible. The Defendants asserted that Duncan gave Siliski an affidavit without having adequate knowledge of the underlying legal proceedings. They attached an affidavit from the court reporter who transcribed Duncan's deposition, indicating that Duncan refused to read or sign the transcript. As to Mr. Siliski's affidavit, the Defendants noted that, although Mr. Siliski had a law license, he was not practicing law and his status was listed as "inactive." They also argued that Mr. Siliski did not have adequate knowledge of the underlying legal proceedings. Thus, they argued that both of the expert affidavits submitted by Siliski should be excluded and that the trial court should grant their motion for summary judgment on Siliski's counter-complaint and her third-party complaint.

On April 18, 2006, the trial court held a hearing on the Defendants' motion for summary judgment. At the hearing, the Defendants argued that Siliski's expert affidavits should be excluded and their motion for summary judgment should be granted. Siliski's attorney maintained that the expert affidavits were admissible and also noted specific material facts disputed by Siliski in her affidavit, such as her allegation that she paid the law firm for a filing fee on a federal lawsuit that was never filed. The trial judge took the motion under advisement, commenting that the case needed a "mercy killing."

On June 9, 2006, the trial court entered an order granting the Defendants' motion for summary judgment. It did not elaborate on its reasoning, but noted specifically that it relied in part on Duncan's deposition. Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the trial court directed entry of a final judgment on Siliski's counterclaims and third-party claims, leaving the law firm's claims against Siliski still pending. From this decision, Siliski now appeals.³

³Siliski's attorney was permitted to withdraw after resolution of the Defendants' motion for summary judgment.

On appeal, Siliski argues that the trial judge erred in granting the Defendants' motion for summary judgment, contending that she offered sufficient evidence to establish disputed material facts. In response, the Defendants maintain that the trial court properly excluded the expert affidavits proffered by Siliski, that Siliski did not establish a claim for legal malpractice, and that the trial court properly granted summary judgment in their favor.

Summary judgment is appropriate only when the facts and the legal conclusions drawn from the facts admit of a single conclusion. *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995). The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). If the movant carries this burden, then the non-moving party must show, through affidavits or other materials, that there is a genuine dispute as to a material fact. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). If the non-moving party fails to establish the existence of a genuine dispute and the moving party establishes her right to a judgment as a matter of law, then the court must grant the motion for summary judgment. Tenn. R. Civ. P. 56.04 (2006).

In order to succeed on a claim of legal malpractice, the plaintiff must show that the attorney owed a duty to the plaintiff, that the attorney breached that duty, that the plaintiff suffered damages, and that the attorney was the actual and proximate cause of those damages. *Gibson v. Trant*, 58 S.W.3d 103, 108 (Tenn. 2001). Whether the defendant attorney breached his duty to exercise the required degree of care and skill is, therefore, an issue of material fact that the plaintiff must establish. Except in cases of such "clear and palpable negligence" that the occurrence of legal malpractice is within the common knowledge of lay persons, Tennessee courts require expert proof to establish the element of breach. *Rose v. Welch*, 115 S.W.3d 478, 484 (Tenn. Ct. App. 2003) (quoting *Cleckner v. Dale*, 719 S.W.2d 535, 540 (Tenn. Ct. App. 1986)). Thus, unless the case involves "clear and palpable negligence," under *Rose v. Welch*, if the defendant attorney in a legal malpractice action moves for summary judgment and establishes, through expert proof, that he did not breach his duty of care, then in order to create a genuine issue of material fact, the plaintiff must respond with rebuttal expert proof that a breach occurred. *See Bursack v. Wilson*, 982 S.W.2d 341, 343-45 (Tenn. Ct. App. 1998). If the plaintiff fails to establish a genuine issue, then the court must grant summary judgment in favor of the defendant attorney. *See id.*

In accordance with the rule stated in *Rose v. Welch*, we first examine Siliski's complaint to ascertain whether her allegations are of such "clear and palpable negligence" that expert testimony would not be required. While Siliski's complaint is not a model of clarity, her legal malpractice claims appear to be based on the following factual allegations: (1) Byrd and Sanney failed to forward to DCS child support payments that Siliski had been ordered to pay, from monies that the law firm held in trust; (2) Byrd and Sanney convinced Siliski to have her home professionally cleaned in order to regain custody of her children in the dependency and neglect proceedings, and falsely told her that DCS would pay for it; (3) Byrd and Sanney filed a motion to alter or amend the order requiring Siliski to pay child support without Siliski's consent; (4) Byrd and Sanney took other unauthorized legal actions on Siliski's behalf; (5) Byrd and Sanney terminated their representation of Siliski at a critical time in her legal proceedings; and (6) Byrd and Sanney allegedly filed untimely motions. None of these allegations indicate such "clear and palpable negligence" that Siliski would not be required to submit admissible expert testimony in support of her claim. Accordingly, we must

review the trial court's apparent exclusion of the expert affidavits by Duncan and by Mr. Siliski that were submitted by Siliski in opposition to the Defendants' motion for summary judgment.

Whether a party's expert evidence is admissible or competent is generally left to the discretion of the trial court. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263 (Tenn. 1997) (citing *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993)). The trial court's ruling on such issues will only be overturned on appeal if the trial court has abused its discretion or exercised it arbitrarily. *Id.* at 263-64. Here, though the trial court below did not explicitly state the basis for its grant of summary judgment, it is clear from our review of the record that the trial court must have deemed the affidavits of Duncan and Mr. Siliski not admissible.

We look first at the exclusion of Duncan's affidavit. From Duncan's deposition testimony, excerpted above, it appears that Duncan was decidedly unfamiliar with the facts involved in Siliski's legal problems. We have previously discussed the standard for expert testimony in a legal malpractice case:

We believe that whether an attorney has failed to meet [the required standard of care] requires a knowledge of the issues involved in the litigation, what proof was available, what steps were taken to advance the client's interests, and what reasons lay behind the choices made. *With all the facts*, a skilled, experienced trial lawyer could give an opinion about how the attorney's actions measured up to the standard of reasonable skill and care.

Hutter v. Cohen, 55 S.W.3d 571, 575 (Tenn. Ct. App. 2001) (emphasis added). From our review of the record, we cannot conclude that the trial court abused its discretion in holding Duncan's affidavit not competent as expert proof. *See McDaniel*, 955 S.W.2d at 263.

We next consider Mr. Siliski's purported expert opinion on the issue of the Defendants' alleged legal malpractice. While Mr. Siliski attended and graduated from law school, it is undisputed that he is no longer a practicing attorney. Under these circumstances, we cannot conclude that the trial court abused its discretion in determining that Mr. Siliski's affidavit was not competent as expert proof. *Id.*

Therefore, Siliski failed to provide competent expert proof that either Byrd or Sanney committed legal malpractice. Consequently, we affirm the trial court's grant of summary judgment in favor of the Defendants on Siliski's claims of legal malpractice.

Having resolved Siliski's claims of legal malpractice, we must now consider her remaining claims.⁴ First, in her counter-complaint, Siliski asserts a breach of contract claim against the law

⁴In their appellate brief, the Defendants made vigorous arguments on Siliski's legal malpractice claims. Surprisingly, however, they chose not to address Siliski's non-malpractice claims.

firm, asserting that she contracted with the law firm to file a lawsuit on her behalf in federal court, and such lawsuit was never filed.⁵

To maintain an action for breach of contract, a plaintiff must establish (1) the existence of an enforceable contract, (2) non-performance of the contract amounting to a breach of that contract, and (3) damages flowing from the defendant's nonperformance. *Ingram v. Cendant Mobility Fin. Corp.*, 215 S.W.3d 367, 374 (Tenn. Ct. App. 2006). The appellate record includes evidence that Siliski contracted with the law firm, through attorney Mark S. Waters, for the law firm to represent Siliski in a federal lawsuit. (V1 at 82, Ex. #4 to Siliski's complaint). Siliski asserts that she paid the law firm a \$150 filing fee for the federal lawsuit. She contends that this federal lawsuit was never filed and that she suffered damages as a result of the law firm's failure to file it. Thus, in her pleadings, Siliski alleges the necessary elements to make a prima facie case of breach of contract.

The Defendants do not address Siliski's breach of contract claim in their motion for summary judgment. While Byrd and Sanney each generally assert in their affidavits that, in their professional opinions, there was no breach of contract with respect to any aspect of Siliski's representation, they do not directly address the alleged failure to file the federal lawsuit. In order for a defendant to succeed on a motion for summary judgment, she must do more than make conclusory assertions that the non-movant plaintiff has no evidence.⁶ *See McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1988). The claim, of course, is a "lawsuit within a lawsuit" cause of action; in order to prove damages, Siliski will have to show that she would have obtained some relief in the federal lawsuit, had it been filed. This may require expert proof. However, the Defendants' affidavits do not address whether Siliski would have obtained any relief in a federal lawsuit had it been filed. Consequently, Siliski was not required to submit expert proof in rebuttal. Moreover, Siliski asserts that, at the least, she is entitled to recover the \$150 filing fee that she paid for a lawsuit that was never filed. Therefore, summary judgment on this claim was improper and must be reversed.

Next Siliski claims that Byrd and Sanney billed her for a meeting that did not take place. Siliski asserts that she was billed for a meeting with the firm's attorneys that supposedly took place on March 18, 2004, but that such a meeting did not occur on that date. As with the breach of contract claim, the Defendants do not address this March 18, 2004 meeting in their motion for summary judgment, or any of the documents filed in support of the motion for summary judgment, or in their appellate brief. While it appears from the record that Byrd and Sanney billed Siliski for the meeting, Siliski does not allege that she paid the bill. Accordingly, she has not alleged that she was damaged by the alleged fraudulent billing. *Sammons v. Rotroff*, 653 S.W.2d 740, 745 (Tenn. Ct. App. 1983) ("In a suit against an attorney for professional negligence, the plaintiff must prove

⁵The breach of contract claim is separate and distinct from the legal malpractice claim because the elements of the two causes of action are separate and distinct. *Compare Gibson v. Trant*, 58 S.W.3d 103, 108 (Tenn. 2001), *with Ingram v. Cendant Mobility Fin. Corp.*, 215 S.W.3d 367, 374 (Tenn. Ct. App. 2006); *see also* 7A C.J.S. *Attorney & Client* § 321 (2007).

⁶Moreover, the law firm entered into more than one contract for legal services with Siliski. The vagueness of the reference to a contract in Byrd's and Sanney's affidavits precludes us from determining to which contract they are referring.

. . . damages resulting from [the attorney's] neglect"). For this reason, we affirm the grant of summary judgment in favor of the Defendants on this claim. This holding, however, does not preclude Siliski from asserting the argument as a defense to the law firm's underlying action to recover unpaid legal fees from Siliski.

Finally, Siliski contends that the law firm wrongfully placed a lien on her real property to secure payment of attorney's fees that were not due on the date the lien was established. Siliski does not appear to assert a "cloud on the title" claim against the law firm, by contending that the lien prevented her from selling her property. Rather, she has asserted the argument as a defense to the Defendants' claim that she fraudulently conveyed her real property to her ex-husband. Thus, insofar as Siliski makes this allegation as an affirmative claim, the trial court properly granted summary judgment in favor of the law firm. However, as with the fraudulent billing, Siliski's allegation may be asserted as a defense to the law firm's assertion of its lien.

In conclusion, we reverse the trial court's order as it applies to Siliski's claim for breach of the contract to file a federal lawsuit. As to the remainder of Siliski's claims, the grant of summary judgment in favor of the Defendants is affirmed.

The decision of the trial court is affirmed in part and reversed in part as set forth above. Costs of this appeal are taxed one-half to Appellant Jennifer Siliski and one-half to Appellees Byrd & Associates, PLC, Rebecca Byrd, and Kenneth Sanney, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE